STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal From the Michigan Court of Appeals
Honorable Bill S. Scheutte, Presiding

HARTMAN & EICHHORN BUILDING CO., INC., a Michigan Corporation,
Plaintiff/Counter-Defendant,
vs.

Supreme Court No. 129733

Court of Appeals No. 249847

STEVEN DAILEY and **JANINE DAILEY**, his wife, and **ABN-AMRO d.b.a. STANDARD FEDERAL BANK**, Jointly and Severally,
Defendants.

Oakland County Circuit Court
No. 01-032203-CK

And

STEVEN DAILEY and **JANINE DAILEY,**
Counter-Plaintiffs/Third-Party Plaintiffs/
Appellees,
vs.
JEFFRY R. HARTMAN, an individual,
Third-Party Defendant/Appellant.

BRIEF ON APPEAL OF APPELLEES JANINE DAILEY AND STEVEN DAILEY

ORAL ARGUMENTS REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

Appellees Janine Dailey and Steven Dailey agree with Appellant's statement of the basis of the jurisdiction of this Court, set forth at page ix of Appellant's Brief on Appeal.

Appellees do not agree that this Court should grant the relief that Appellant seeks. This Court should deny the relief Appellant requests and affirm the decision of the Court of Appeals and remand this action to Circuit Court for trial.

STATEMENT OF ISSUES PRESENTED

Appellees do not agree with the Statement of Issues Presented as set forth in Appellant's Brief on Appeal, page viii. The issues presented in this appeal are more accurately stated as follows:

1. ***Does the "regulated industry" exception in section 4 of the Michigan Consumer Protection Act[1], MCL 445.904, exempt from the application of the MCPA persons who are licensed as residential builders under the Residential Builders and Contractors provisions of the Occupational Code, MCL 339.2401, et seq.?***

The Trial Court did not address this question, but proceeded on the basis that the answer is NO.

The Court of Appeals answered this question NO.

Appellees answer this question NO.

Appellant answers this question YES.

2. ***Does the Michigan Consumer Protection Act impose liability on individuals who actively participate in violations of the MCPA?***

The Trial Court answered this question NO.

The Court of Appeals answered this question YES.

Appellees answer this question YES.

Appellant answers this question NO.

[1] Referred to hereinafter as "MCPA" or "the Act".

STATEMENT OF FACTS

Appellees Janine Dailey and Steven Dailey ("Appellees" or "the Daileys") agree with portions of Appellant Jeffry Hartman's ("Appellant" or "Hartman") description of the underlying facts and proceedings to date. However, certain additional facts are necessary for a more complete understanding of this case. Additionally, Appellant discusses a number of "facts" and includes documents in his Appendix that were never part of the trial court record, and which should not be considered by this court. Thus, Appellees find it necessary to offer this Counter-Statement of Facts.

At the top of page 7 of his Brief on Appeal, Appellant says that the Daileys were "dissatisfied" with the work performed by Hartman and his company, Hartman & Eichhorn Building Co., Inc. ("HEBC"). That is an understatement. Hartman's misconduct and the extent of the damage are described in detail in the Dailey's Counter-Complaint/Third-Party Complaint, found at pages 102a through 195a of Appellant's Appendix.[2]

Construction began on June 19, 2000. Appellant's Appendix, p. 105a, ¶22. Some time thereafter, the Daileys questioned Hartman about a structural I-beam being erected in the wrong place and without an adequate footing or other support. Hartman personally represented that there were adequate footings under the beam, and repeated these representations to the Daileys many times thereafter. Appellant's Appendix, p. 107a, ¶33.

[2] The pleading ends at p. 118a, the remaining pages are exhibits to the pleading. The Daileys also filed an Amended Counterclaim/Third Party Complaint, but the pertinent factual allegations are unchanged.

During construction HEBC failed to protect the home from the elements, leading to rain water saturating the kitchen and leading to the growth of mold. Appellant's Appendix, p. 107a – 108a, ¶¶35 - 39. When questioned by the Daileys, Hartman admitted that this was his company's fault and assured the Daileys he would take care of it. *Id* at ¶40. He didn't. *Id* at ¶41.

Problems mounted as construction progressed. On October 11, 2000, the Daileys voiced concerns about numerous areas of the house that were not in compliance with the architectural plans that HEBC had agreed to follow. Appellant's Appendix, p. 108a, ¶47. Hartman requested that the weather-tight stage installment of $41,510.25 be paid. The Daileys asserted the home was not weather tight and, with the aid of a structural engineer,[3] prepared a list of 24 structural problems to be fixed before they would make the payment. When presented with the list, Hartman again demanded payment of the installment before any corrections would be made. Appellant's Appendix, p. 109a, ¶¶49-51. Hartman then represented that if the Daileys paid $22,000.00 of the installment, he would proceed to correct the 24 defects noted on the check list. Based upon that representation the Daileys wrote a check for the $22,000.00. *Id* at ¶¶52-53.

After six minor corrections were made, Hartman demanded the balance of the third installment. The home was still not weather tight. *Id* at ¶54. Payment was refused due to the failure to make the promised repairs, poor workmanship, and the absence of footings. *Id* at ¶57. On November 2, 2000, Hartman abandoned the property and refused to continue with the project. Appellant's Appendix, p. 110a, ¶58.

[3] See the engineer's report, Appellant's Appendix, p. 152a – 167a.

On May 31, 2001, HEBC commenced this action against the Daileys, asserting counts of Breach of Contract, Unjust Enrichment and Foreclosure of a Construction Lien. Appellant's Appendix, p. 78a -101a. On June 27, 2001, the Daileys filed a single pleading that combined their counter-claim against HEBC with a third party complaint against Jeffry Hartman.[4] Hartman's answer to the Counter-Complaint/Third-Party Complaint did not claim any exemption, exclusion or immunity from the MCPA, and it cannot be inferred from any part of his answer and affirmative defenses. Appellee's Appendix, p. 1b – 20b.

On August 14, 2002, Hartman and HEBC filed three separate motions for summary disposition.[5] Hartman argued that at all times he dealt with the Daileys solely as an agent of HEBC, never in an individual capacity. HEBC also argued that the Daileys had failed to state a claim for fraudulent misrepresentation or for a violation of the Michigan Consumers Protection Act. ***Hartman's and HEBC's motions never even hinted, much less argued, that he and his company were exempt from application of the MCPA.*** No exhibit or other evidence was presented to show that HEBC and Hartman were even licensed. Appellees' Appendix, p. 21b – 68b.

The motions were argued before Oakland Circuit Judge Colleen O'Brien on November 20, 2002 (Transcript of Proceedings, Appellant's Appendix, p. 49a – 79a).

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[4] It may have been more correct procedurally to join Hartman as an additional counterclaim defendant. That can be corrected on remand.

[5] Hartman sought dismissal of the third party claims against him. Appellees' Appendix, p. 21b – 44b. HEBC asked for dismissal of the Counterclaims against it. Appellees' Appendix, p. 45b – 48b. HEBC also asked for judgment on its claims against the Daileys. Appellees' Appendix, p. 49b – 68b.

Hartman's counsel ***never*** argued that HEBC or Hartman were exempt from application of the MCPA. Appellant's Appendix, p. 52a – 57a. Appellant's counsel now claims that the Daileys' counsel raised the exemption question (Appellant's Brief, fn. 2 at page 8 -9), but that is a tortured misinterpretation of the argument. The question of exemption was not addressed at all; rather, Daileys' counsel made passing reference to *Forton v Laszar*[6] as part of his argument that Mr. Hartman was personally liable for violations of the MCPA. Appellant's Appendix, p. 68a. The parties argued the summary disposition motions under the unchallenged understanding that licensed residential builders are not exempt from the MCPA. The trial court issued an Opinion and Order on December 11, 2002 (Appellant's Appendix, p. 31a – 37a). Nowhere in her opinion does Judge O'Brien address the exemption question ***because the question was not raised before her***. It was the Daileys' interlocutory appeal from Judge O'Brien's decision that lead to the Court of Appeal decision and, finally, to this Court.

The first time Hartman raised the exemption under Section 4(1)(a) of the MCPA[7] was in his Appellee's Brief to the Court of Appeals. It was not set out in Hartman's affirmative defenses, it was not presented in any motion to the trial court *at any time*, and it was not part of the summary disposition decision that was the immediate precursor to this appeal. The first time the Daileys had to respond to the exemption argument was in their Reply Brief in the Court of Appeals. As Judge Sawyer noted in

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[6] 239 Mich App 711; 609 NW2d 850 (2000), *lv to appeal denied*, 463 Mich 969; 622 NW2d 61 (2001), *reconsideration denied,* 463 Mich 971, 626 NW2d 413 (2001).

[7] MCL 445.904(1)(a).

his separate opinion in the Court of Appeals decision in this matter, "the trial court did not decide this question and, therefore, we should decline to address it as well." *Hartman & Eichhorn Bldg. Co. v. Dailey,* 266 Mich. App. 545, 553 fn. 1; 701 NW2d 749 (2005). For Appellant to suggest that the issue was raised at an earlier time is disingenuous, at best.

Hartman also makes reference in his statement of facts to certain proceedings before the Department of Labor and Economic Growth, Residential Builders Board. See Appellant's Brief, p. 7 and 20 – 21. In his appendix he reproduces documents pertaining to those proceedings, Appellant's Appendix, p. 196a - 199a and 211a – 228a. He also reproduces unauthenticated printouts from the Department of Labor and Economic Growth website purporting to show the status of Hartman's and HEBC's builder's licenses. Appellant's Appendix, p. 200a, 201a. Hartman's and HEBC's summary disposition motions, which remain the underlying procedural context of this appeal, made no reference to the administrative proceedings and did not include any of the documents now made part of Appellant's Appendix. It is inappropriate for Appellant to include those materials in his brief and appendix, and improper to present arguments relying on such materials.

ARGUMENT

A. THE STANDARD OF REVIEW.

Appellant correctly recites that the standard in the interpretation of a statute is *de novo* review. However, that is not a complete statement of the standard of review to apply in this case. This appeal comes before the Court in the context of motions for summary disposition brought under MCR 2.116(C)(8) and (C)(10).[8] This Court reviews the grant or denial of a motion for summary disposition *de novo*. *Groncki v Detroit Edison Company*, 453 Mich 644, 649; 557 NW2d 289 (1996).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with evidence beyond the face of the pleading. All factual allegations in support of the claim are accepted as true as well as any reasonable inferences or conclusions that can be drawn from the allegations. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999).

A motion under MCR 2.116(C)(10) tests the factual support for the claims asserted. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and

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[8] Exemption from the MCPA is an affirmative defense, MCL 445.904(4), "The burden of proving an exemption from this act is upon the person claiming the exemption." Thus, to raise it in a motion, Hartman's motion should have been brought under MCR 2.116(C)(7) which pertains to immunity, release and other affirmative defenses. This is not a mere matter of mislabeling a motion, but further proof that **the question of exemption was never raised before the trial court.**

other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Company*, 451 Mich 358; 547 NW2d 314 (1996), *Wade v Department of Corrections*, 439 Mich 158; 483 NW2d 26 (1992). This Court, on appeal, considers the entire record, including those same affidavits, depositions and other evidence, and makes its own determinations whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Adkins v Thomas Solvent Co*, 440 Mich 293, 487 NW2d 715 (1992).

B. RESIDENTIAL BUILDERS ARE NOT EXEMPT FROM THE MICHIGAN CONSUMER PROTECTION ACT.

The key question in this appeal is whether this Court's holding in *Smith v Globe Life Insurance Co.*, 460 Mich 446, 597 NW2d 28 (1999) should be extended to licensed residential builders. It is widely understood that in *Smith*, this Court held that consumer credit insurance transactions by insurance companies licensed and regulated under the Credit Insurance Act are exempt from coverage under the MCPA pursuant to section 4(1)(a) of the Act, MCL 445.904(1)(a).[9] That section states that the MCPA does not apply to "A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the

[9] The Court also ruled that there was an exception to this exemption, allowing suits against credit insurance companies for some MCPA violations. Since the credit life insurance transaction was excluded from the exemption, the Court did not need to address the general scope of the exemption. The "general transaction" standard may, in fact, be *dicta* unnecessary to the decision. (That exception to the exemption was undone by subsequent legislation. See MCL 445.904(3) as added by 2000 PA 432.)

United States." This Court interpreted that section to mean that the extent of regulatory oversight of credit insurance transactions makes them exempt from the MCPA.

This case addresses the scope of the 904(1)(a) exemption as interpreted by *Smith v Globe* – whether the exemption applied to credit insurance companies in that case extends to residential builders and, potentially, any other business regulated in a manner similar to residential builders. The question is whether this exemption is limited to industries such as credit insurance and banking, where regulators review and approve the details of each "transaction or conduct", or whether the exemption applies to any business that is licensed by the state. If the former, then most consumer businesses will not be exempt, and will be required to live up to the standards of the MCPA in their consumer transactions. If the latter, however, then this exemption applies to any business that has a licensing scheme similar to the one applicable to residential builders, and a large portion of Michigan businesses will be able to engage in unfair or deceptive practices without concern for MCPA liability. The MCPA will be unavailable for protection or redress in many of the most important and common consumer transactions.[10]

Appellees submit that *Smith v Globe* does not require this Court to find residential builders exempt from the Michigan Consumer Protection Act. Nor does the

[10] One writer has suggested that under the *Smith v Globe* decision, "the MCPA has entered a new era. Indeed, there may be little left of the power to protect consumers that the legislature had in mind when it passed the act." Victor, "The Michigan Consumer Protection Act: What's left after *Smith v Globe*?", Vol. 82, No. 9 Michigan Bar Journal 22, 25 (2003).

language of the Act itself require such a ruling. The plain language of the Act, as well as its goals, will be circumvented by a finding that residential builders, and all the other businesses operating under similar licensing and regulation schemes, have blanket exemptions from liability under the Consumer Protection Act.

1. The Michigan Consumer Protection Act was designed to be a broadly-applicable standard for businesses conducting consumer transactions.

The Michigan Consumer Protection Act was enacted in 1976, during a period in which similar "laws of broad applicability [were] enacted in every state and the District of Columbia prohibiting unfair or deceptive acts and practices and unfair competition in the marketplace." Annotation, "Right to Private Action under State Consumer Protection Act – Equitable Relief Available", 2001 ALR5th 6, sec. 2 (citations omitted). A central motive for such legislative efforts was a recognition that state and federal agencies could not and should not attempt to police all unfair business practices through administrative proceedings.

> [I]t has been stated that the enactment of private rights of action was a response to the inability of state attorneys general and other enforcement agencies to address each and every unfair or deceptive practice within their state through enforcement actions.

Id., citing *Slaney v Westwood Auto, Inc.*, 366 Mass 688, 322 NE2d 768 (1975).

The MCPA "was enacted to provide an enlarged remedy for consumers who are mulcted by deceptive business practices …" *Dix v American Bankers Life Assurance Co.,* 429 Mich 410, 417; 415 NW2d 206 (1987). Consumers were given a private right of action to challenge deceptive business practices, independent of state agencies, whose

capabilities and zealousness may wax and wane. The Act also sought to level the playing field for consumer-friendly businesses, providing a disincentive for unfair practices that otherwise might provide a competitive edge.

In reviewing the statutory exemption language, the Court should consider the purpose of the MCPA and the objective it seeks to accomplish. See *Lorencz v Ford Motor Co.*, 439 Mich 370, 377, 483 NW2d 405 (1992). "The clear intent of the MCPA is to protect consumers in the purchase of goods and services." *Forton v Laszar*, *supra*, 239 Mich App at 715. It is well-established that remedial statutes are to be liberally construed in favor of the persons who are intended to benefit. *Putkamer v. Transamerica Ins. Corp. of America,* 454 Mich. 626, 563 NW2d 683 (1997). The title of the Act itself identifies those intended beneficiaries – consumers.

The Legislature drafted the MCPA to apply to "trade or commerce", defined to include virtually all consumer transactions. MCL 445.902(d). A reasonably narrow construction of exemption sections will allow the Act to accomplish its goals. If construed too broadly, the exemption provision will swallow the statute whole. It is an established rule of statutory construction that exemptions from statutes are closely scrutinized and not extended beyond their clear meaning. Michigan Law & Practice, Statutes §112, citing *Rzepka v. Farm Estates, Inc.,* 83 Mich App 702, 269 NW2d 270 (1978), among others.

2. The Plain Language of Section 4(1)(a) of the MCPA does not provide for blanket exemptions for state-regulated industries.

Section 4(1)(a) of the MCPA, MCL 445.904(1)(a), provides that the Act does not apply to:

> A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

The exemption section was not designed to create a blanket exemption for all regulated businesses. The section does not say that all transactions and conduct of businesses licensed by the State or otherwise regulated by a board or officer are exempt. Only those transactions and conduct that are "specifically authorized" under other laws are exempt. With this exemption, the legislature sought to allay concerns of businesses and regulators that practices specifically made legal, or even required, by other statutes or regulations will be found illegal under the broad prohibitions of the MCPA.

The South Carolina Supreme Court explained a nearly identical provision of the South Carolina Unfair Trade Practices Act[11]:

> The purpose of the exemption is to insure that a business is not subjected to a lawsuit under the Act when it does something required by law, or does something that would otherwise be a violation of the Act, but is allowed under other statutes or regulations. ***It is intended to avoid conflict between laws, not to exclude from the Act's coverage every activity that is authorized or regulated by another statute or agency.*** Virtually every activity is

[11] The language of the South Carolina statute is nearly identical to MCPA § 4(1)(a). S.C. Code §39-5-40 provides an exemption for "actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina state law."

> regulated to some degree. The defendant's interpretation of the exemption would deprive consumers of a meaningful remedy in many situations. (emphasis added)

Ward v Dick Dyer and Associates, 304 SC 152, 403 SE2d 310, 312 (1991), quoting *Skinner v Steele,* 730 SW2d 335, 337 (Tenn App 1987).

The *Ward* decision was, in fact, a refinement of that Court's earlier interpretation of the scope and application of the exemption provision. Previously, the South Carolina Supreme Court had held that a party was exempt when its "general activities" were regulated, *State ex rel. McLeod v. Rhoades,* 275 S.C. 104, 267 SE2d 539, 541 (1980), not unlike the "general transaction" standard adopted in *Smith v Globe Life*. The *Ward* court, however, acknowledged that the "general activities" standard was incorrect:

> After much research and consideration of the events concerning the regulation of businesses during the past ten years since the *Rhoades* decision, we believe that a "general activity" test would not fulfill the intent of the Legislature in prohibiting unfair trade practices. We believe that the exemption is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes.
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> 403 SE2d at 312.

The exemption language of the MCPA simply does not, on its face, exempt all the transactions and conduct of whole industries and types of businesses, but only those transactions and conduct that are *specifically authorized*. Moreover, the burden is on the party claiming the exemption to prove its application. MCL 445.904(4). Clearly, this calls for a more narrow application than exempting every transaction carried on by any business that is licensed and regulated by the state.

An example of a transaction or conduct that would be exempt from MCPA coverage as "specifically authorized" can be found in the Motor Vehicle Service and Repair Act (MVSRA), MCL 257.1301 *et seq*. The MVSRA establishes an extensive regulatory scheme for motor vehicle repair facilities, overseen by the Bureau of Automotive Regulation. The written estimate section of the MVSRA specifically authorizes motor vehicle repair facilities to charge "10 percent or $10, whichever is less" over a written estimate without obtaining "the written or oral consent of the customer… unless specifically requested by the customer." Charging **any** amount above a written estimate without obtaining the consent of the consumer arguably could violate several subsections of the MCPA.[12] Because charging a certain amount in excess of a written estimate is "specifically authorized" under the MVSRA, however, motor vehicle repair facilities that impose such charges are exempt from suit under the MCPA.

Similarly, 25% interest on a financed car sale may be charging an amount for credit that is "grossly in excess of the price at which similar …services are sold", and thus be in violation of the MCPA. MCL 445.903(1)(z). Charging an interest rate up to 25% on a motor vehicle installment contract is, however, permitted by the Motor Vehicle Sales Finance Act. MCL 492.118. A financed car sale with this interest rate thus is "specifically authorized" under laws administered by a state agency, and therefore exempt from the MCPA.

[12] Charging more than the customer was originally told may, for instance, cause "a probability of confusion or of misunderstanding as to the …obligations…of a party to a transaction." MCL 445.903(1)(n).

3. The transactions and conduct of Residential Builders are not "specifically authorized" as are those of insurers and other businesses.

In responding to the concerns expressed in a dissenting opinion, the majority in *Smith v Globe* declared that "insurance companies are not 'like most businesses.'" 460 Mich at 466. The Court thus indicated that its opinion would have limited application, based as it was on the extraordinary extent of state regulation of the terms of each insurance transaction. The Court recognized that all insurance transactions require a degree and type of state authorization that is equaled by few if any other consumer industries.

Credit insurance transactions are regulated by the Credit Insurance Act, MCL 550.602 through 550.624, and twenty-one rules in the Administrative Code, containing more than 130 subsections. MAC R550.201 through R550.221. Virtually every document used to arrange and sell credit insurance must be submitted for review by the Insurance Commissioner before being used to sell insurance to consumers, MAC R550.209(2). The Commissioner has 30 days to disapprove a document for use. MCL 550.613. If the Commission does so, use of the document is unlawful. MCL 550.614.

The Court in *Smith v Globe* cited this extraordinary oversight of the entire written credit insurance transaction as the basis for Defendant insurance company's claim of exemption:

> Defendant asserts that its application and certificate of insurance forms were submitted to and implicitly approved by the State Commissioner of Insurance. Hence, it contends, the immediate

> transaction, the sale of credit life insurance, was "specifically authorized" and, therefore, was exempted under sec. 4(a)(1).

460 Mich at 463 (footnotes omitted). The associated footnotes quote the statutory sections requiring all basic insurance contract documents to be submitted to and reviewed by the state before use. MCL 550.612 and MCL 550.613.

Beyond reviewing all transaction documents before use, the Commissioner has authority over all rates and premiums charged in credit insurance transactions. Rates are set by rule; credit life insurance rates must conform to MAC R550.211, credit accident and health insurance rates to MAC R550.212.

The Insurance Code "manifest(s) an intent to regulate the entire insurance and surety business field, ***and not leave any portion of it unregulated***." Michigan Law and Practice, Insurance, §1 (emphasis added, citations omitted). On the other hand, the purpose of the residential builders licensing act is to "protect homeowners from 'incompetent, inexperienced, and fly-by-night contractors,'" *Kirkendall v Heckinger*, 105 Mich App 621, 627, 307 NW2d 699 (1981), citing *Alexander v Neal,* 364 Mich 485, 487, 110 NW2d 797 (1961). Clearly, this is a less pervasive degree of regulation, setting minimum standards instead of dictating the details of every transaction, and calls for a different analysis.

4. Hartman's transactions and conduct at issue in this case were not specifically authorized by the Occupational Code or pertinent regulations, and are not exempt from the MCPA.

In a very recent decision, U.S. District Court Judge Nancy Edmunds recognized that the scope and application of the section 4(1)(a) exemption "was a difficult [issue]."

Wong v T-Mobile USA, Inc., 2006 U.S. Dist. Lexis 49444, [*14] (ED MI 07/20/2006), Appellees' Appendix, p. 69b – 78b. After thoughtfully analyzing *Smith v Globe* and several other decisions, she reached this conclusion:

> These cases demonstrate that while *Smith* unquestionably broadened the MCPA's exemption for conduct authorized by a government agency, it did not abrogate the statute entirely. **Even if a defendant is licensed or regulated, it may remain liable under the MCPA for conduct outside the scope of its license or the pertinent regulations. In other words, "specifically authorized" does not simply mean "not prohibited."** To conclude otherwise would be to create a gap in enforcement in those areas not covered by government regulation.
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> 2006 U.S. Dist. Lexis 49444, [*19 - *20], emphasis added.

Judge Edmunds then analyzed the transaction at issue before her, alleged over-billing by a cellular phone service provider. She reviewed the extensive federal statutes and regulations covering the provision of cellular phone service, and concluded that the provider's billing practices were not "specifically authorized" and thus not exempt from claims under the MCPA. 2006 U.S. Dist. Lexis 49444 [*25]. Thus, although the defendant is in one of the most closely regulated industries in existence, it is not immune from suits under the MCPA.

A similar analysis in this case leads to a similar conclusion. The provisions of the Occupational Code that apply to residential builders, MCL 339.2401 – 339.2412, are devoid of any specific authorizations of transactions or conduct. There are broad definitions of "residential builder" and other positions, MCL 339.2401. There are exemptions from licensure, MCL 339.2403. Minimum licensing qualifications are set forth, MCL 339.2404. Contributions to the Homeowners Construction Lien Recovery

Fund are made mandatory, MCL 339.2409. Perhaps most significant is MCL 339.2411, which lays out in detail the conduct of a licensee that will result in discipline, and the procedures applicable to certain complaints. The most that can be said of this provision, however, is that *it defines prohibited conduct*. Nothing in these provisions makes any transaction or conduct "specifically authorized".

The Residential Builders Board does not review or approve contracts or other documents, has no authority over amounts charged by the industry, and does not set minimum construction standards or practices. The Board's rules, MAC R338.1511 – R338.1555, have no guidelines for contents of contracts, only requiring that copies of contracts be provided to consumers, with plans and specifications when new construction is involved. MAC R338.1533. No rules address construction rates and charges, or construction techniques. Some rules prohibit certain activities, e.g., "Advertising shall not misrepresent material facts." MAC R338.1532(1). But expressly prohibiting unethical or illegal conduct is a far cry from making other conduct "specifically authorized." Nothing in these regulations could be fairly read as specifically authorizing anything.

Hartman cannot claim the protection of the exemption because he cannot point to any conduct or transaction at issue in this case that has been "specifically authorized" under the pertinent statutes or regulations. He suggests that the mere act of entering into a contract with the Daileys is sufficient, but he can point to no section of the statute or the regulations that, in so many words, specifically authorize him to enter into contracts. More importantly, the Daileys do not complain of the contract itself, but

Hartman's conduct once it was executed. If entering into the contract was enough, then merely being a licensee in a regulated industry would trigger the exemption, and the language of §4(1)(a) – "transaction or conduct specifically authorized" – would be meaningless. The legislature could not have intended such a result. It will not be presumed that the Legislature intended to do a useless thing, and if possible every part of a statute must be given effect. *Davis v. Imlay Twp. Bd.*, 7 Mich App 231, 151 NW2d 370 (1967).

To properly give effect to the language of MCPA §4(1)(a), the Court must find that Hartman is not exempt. Such a holding will not lead to the parade of horribles that Appellant suggests. Even if the §4(1)(a) exemption applies, it does not bar suits at common law for breach of contract, fraud or other claims, so a rogue builder such as Hartman could still face multiple proceedings. The Residential Builders Board can avoid this result by staying proceedings until court actions are resolved or, as in this case, decline to award restitution due to the pendency of a civil action. If a restitution award was made by the Board – and actually paid – the court would allow it as an offset against any verdict or judgment.

Appellant waxes eloquent on restitution and other benefits available to the consumer through the administrative process. This case is, in fact, proof of how impotent that process really is. First, it must be remembered that ***Jeffry Hartman sued the Daileys***, not vice versa. The Daileys counterclaimed under the MCPA, as well as other causes of action, and commenced the administrative proceedings, only in response to Hartman's claims. The stipulation ending the administrative proceedings

makes no order for restitution because of the pendency of this civil action. Moreover, the remedies available against a builder under the Occupational Code are essentially limited to the suspension or revocation of the builder's license, and possibly restitution of some or all of the amounts paid by the customer. MCL 339.602. These administrative remedies pale in comparison to the remedies available under the MCPA, which may include actual pecuniary damages, mental distress and other "hedonistic" damages, costs and attorney fees. MCL 445.911, *Avery v Indust. Mortg. Co., L.P.,* 135 F Supp 2d 840 (WD MI 2001). Restitution is meaningless to a builder who is willing to give up his license, since the state has no other leverage to enforce it. See MCL 339.603. And unlike the civil penalty imposed by the State, restitution is dischargeable in bankruptcy, a process with which Mr. Hartman is very familiar. See 11 USC §523(a)(7).

C. A CORPORATE AGENT MAY BE HELD PERSONALLY LIABLE FOR HIS PARTICIPATION IN VIOLATIONS OF THE MCPA.

This case presents an issue of apparent first impression: Does the Michigan Consumer Protection Act MCL 445.901 *et seq*, allow for personal liability against the agent of a corporation who actively participates in violations of the Act?

To reiterate, the Daileys alleged that Hartman individually was liable for violation of the MCPA. The trial court denied HEBC's motion for summary disposition but granted Hartman's motion for summary disposition on this claim, apparently because "the Dailey's were dealing with him exclusively in his capacity as an officer and agent of HEBC." (Appellant's Appendix, p. 36a – 37a). This is legally erroneous. The Court of Appeals majority said all that needs be said on this subject:

Next, the Daileys argue that the trial court erred in granting summary disposition on their claim under the MCPA. Again, the only basis for the trial court's grant of summary disposition was that there would be no individual liability by Hartman. We agree with the Daileys that the Legislature intended to hold individuals, and not just their businesses, liable for conduct that violates the MCPA. …

The MCPA enables victims to sue those who violate the act, but the enabling provision does not expressly limit a victim's choice of violating defendants to a certain class or type. [footnote omitted] Nothing in the act expressly states whether an individual who violates the act in his or her capacity as an employee or corporate officer is personally liable in a civil suit. Nevertheless, we note that most of the violations listed in MCL 445.903 have the common root of fraudulent or deceptive practice, and, as noted above, torts are generally applicable first to the actual tortfeasor and then vicariously to his or her employer in certain circumstances. In the realm of torts, holding a company liable first and determining the liability of employees and executives second is the equivalent of drifting a raft upstream.

Also, the MCPA makes unlawful "unfair, unconscionable, or deceptive *methods*, *acts*, or *practices* in the conduct of trade or commerce …" [footnote omitted] Therefore, the act redresses actual conduct, not board resolutions, and it goes without saying that no corporation or other business entity can do anything, including violate the MCPA, without human action. This case makes the point perfectly. While the Daileys claim that HEBC violated the act through various representations and omissions, they attribute those same representations and omissions to Hartman and claim that the acts sustain their MCPA claim against him individually. Because the Legislature constructed the MCPA so that actions, rather than affiliations, yield liability, individuals are necessarily the act's primary violators. It stands to reason that, absent express language to the contrary, the Legislature intended that those who actually violate the act would be the ones from whom victims could recover damages, regardless of the violators' affiliation with any business entity.

Finally, the plain language of MCL 445.911(7) indicates that the act generally envisions individual liability. The subsection states that "when a person commences an action against *another person*, the defendant may assert…any claim under this act…". [footnote omitted] In the absence of a caveat excluding individuals

> acting as owners, employees, board members, or executives, this language declares what should be intuitive - those who may sue for violations of the act may sue those who violate the act. Therefore, Hartman was personally liable for any MCPA violations that resulted from his conduct, and the trial court erred when it held to the contrary.
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> *Hartman & Eichhorn v Dailey*, 266 Mich App at 550 – 552.

The Court of Appeals holding on this issue is soundly supported not only by straightforward statutory construction, but by sound public policy. The purpose of the MCPA is to protect consumers in their purchase of goods and services that are used for personal, family, or household purposes. *Zine v Chrysler Corporation*, 236 Mich App 261, 271; 600 NW2d 384 (1999). To hold the corporate agent individually liable for the violations serves to deter misconduct.

The Court of Appeals decision on this issue is consistent with decisions by courts in states with similar consumer protection act statutes: Massachusetts and Missouri.[13]

In *Standard Register Co. v Bolton-Emerson, Inc.*, 38 Mass App 545; 649 NE2d 791 (1995), corporate officers induced the plaintiff into entering a contract which they knew could not be honored. Claims were brought under the Massachusetts Consumer Protection Act against the corporation which was the party to the contract and the

[13] The similarity of the three statutes is instructive. The Massachusetts act defines "person" as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity." Anno. Laws Mass. Ch. 93, §1. The Missouri statute defines it as "any natural person or his legal representative, partnership, firm, for-profit or not-for-profit corporation, whether domestic or foreign, company, foundation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or *cestui que* trust thereof". Mo. Stat. Ann. §470.010(5). Michigan's Consumer Protection Act defines a person as "a natural person, corporation, trust, partnership, incorporated or unincorporated association, or other legal entity." MCL 445.902(c).

officers regarding the misrepresentations. Two defenses were raised, both which are pertinent here. First, that a limitation of liability provision in the contract precluded consequential damages such as those sought under the consumer protection act, and second, that the corporate officers were not parties to the contract and were therefore not liable.

In ruling against the defendants on both defenses, the Court described actions brought under the Massachusetts Consumer Protection Act as "neither wholly tortious nor wholly contractual in nature", and stated that claims of unfair or deceptive acts may be founded on activities resembling a breach of contract action or an action in tort. (Id., at p. 548). The Court ruled:

> The facts supporting the deceitful conduct of the defendants which are the basis of the [Consumer Protection Act] claim are distinct from those giving rise to the breach of contract claim. In addition, the [Consumer Protection Act] claim is predicated on the tort theory of common-law misrepresentation rather than merely a restatement of a breach of warranty claim under the contract as contrasted with Canal Electric. We hold that because the tort-like elements of the [Consumer Protection Act] claim predominate over the contract elements, the limitation of liability provisions in the [contract] are ineffective to bar [plaintiff] from recovering for a violation of the [Consumer Protection Act] based upon deceitful activity. (at p. 548).
>
> Even if the limitation of liability provisions of the [contract] shielded [the corporate defendant] from liability under the [Consumer Protection Act], the provisions have no effect on the independent liability of [the corporate officers] who were not parties to the contract. ***Although acting within the scope of their authority as officers of [the corporation], [the corporate officers] remain personally liable for their own misrepresentations made to [plaintiff] in violation of the [Consumer Protection Act], even though they did not sign the agreement.*** (at p. 548, emphasis added)

See also *Nader v Philip Citron*, 372 Mass 96; 360 NE2d 870 (1977) and *Community Builders, Inc. v Indian Motorcycle Associates, Inc*., 44 Mass App 537; 692 NE2d 964 (1998), both holding that an officer and director of a corporation is not immunized from Consumer Protection Act claims for acts personally committed.

Like Michigan, Missouri's Consumer Protection Act forbids the immunization of corporate officers from their involvement in tortious conduct while acting on behalf of a contracting corporate party. In *State of Missouri v Marketing Unlimited of America, Inc*., 613 SW2d 440; 1981 Mo. App. LEXIS 2641 (MO App, 1981), Consumer Protection Act claims were brought against certain officers and directors of a corporation for their involvement in a "cactus egg" scheme. The Court noted that under Missouri law, officers of a corporation may be held individually liable under Missouri's Consumer Protection Act and held that:

> Under the statutory scheme, the definition of "person" clearly indicates a legislative intent to subject those 'persons' who have engaged in unlawful practices to the remedial provisions of the Missouri [Consumer Protection Act]. This is true whether they are officers, salesman or employees of a corporation or acting in their individually capacity.
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> 613 SW2d at 447

The Consumer Protection Act in Michigan is very similar to the Consumer Protection Act statutes in Massachusetts and Missouri. Michigan's Act is a "remedial statute and must be construed liberally to reach the legislature's goal." *Price v Long Realty*, 199 Mich App 461, 470 – 471; 502 NW2d 337 (1993). The factual scenarios of the cases discussed are on all fours with regard to the issue involved: whether corporate

officers can be liable for a Consumer Protection Act claim for their person tortious conduct in the furtherance of a corporate contract. Given that the legislative intent of all three states is to protect consumers in the purchase of goods and services, and that the statutes are remedial in nature, the conclusion of this Court should follow our sister states: that Hartman is not immune from claims under the MCPA for prohibited conduct in which he engaged.

Appellant makes an argument that attempts to draw a distinction between a "person" and a "business", and then construes "business" to mean a corporation, partnership, limited liability company or other artificial entity. First, there is no basis in the statute for drawing such a distinction. MCL 445.902(c) defines "person" as "a natural person, corporation, trust, partnership, incorporated or unincorporated association, or other legal entity." The MCPA does not define "business". The codified rules of statutory construction do not define "business". See MCL 8.3 - MCL 8.31. Where a statute makes no specialized definitions, and there is some question of the meaning of a word or phrase, courts accord terms their plain and ordinary meanings and may consult dictionary definitions in such situations. *Griffith v. State Farm Mut. Auto. Ins. Co.*, 472 Mich. 521, 697 N.W.2d 895 (2005).

The standard dictionary definition of "business" is "an occupation, profession or trade", Webster's Encyclopedic Unabridged Dictionary (2001) p. 283. Black's Law Dictionary (8th Ed. 1999) p. 211 gives a nearly identical definition. See also 5A Words & Phrases (Permanent Ed. 1967).

Appellant's argument in this regard must be rejected. By any fair and logical reading of the MCPA, Jeffry Hartman is personally liable to the Dailey's for those MCPA violations in which he personally participated.

CONCLUSION AND RELIEF

As demonstrated in this brief, businesses are not exempt from the Michigan Consumer Protection Act simply by virtue of being licensed under state law. On the contrary, to be exempt, a business must show that the transaction or conduct in question has been ***specifically authorized*** by law. Appellant Jeffry Hartman has made no such demonstration. And as a matter of sound statutory construction, he may be held liable personally for his active participation in violations of the MCPA.

Appellees Janine Dailey and Steven Dailey ask this Court to affirm the result reached by the Court of Appeals, and remand this case to the Oakland County Circuit Court for trial.

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